No. 91-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner
v.
B. E. TILLEY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL MEMORANDUM IN RESPONSE TO BRIEF OF AMICI CURIAE

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INTRODUCTION

This supplemental brief responds to the Brief Amici Curiae of two actuarial groups, which was filed on November 1, and which Respondents did not receive until after they had filed their opposition to certiorari.[1]

ARGUMENT

1. Amici's attorneys argue that the provisions governing reversion of assets to the employer in the Mead plan ". . . are like those in thousands of other plans." We disagree, of course. The Court may ascertain for itself the

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[1] See Brief of Amici Curiae American Academy of Actuaries and American Society of Pension Actuaries in Support of Petitioner ("Actuarial Groups Brief").

language that careful draftsmen use when they intend to limit the benefits payable on plan termination to those required under the statute. We have provided language from specimen plans published in several leading, widely available, reference works which demonstrate that the Amici's sweeping assertions are unworthy of belief. (See Appendix to this Memorandum.) As we pointed out before, and as these examples from oft consulted authorities suggest, the Mead plan's formulation, "benefit rights and contingent rights accrued under the plan" is hardly universal. So far as we have been able to determine it is unique.[2] Furthermore, the rule that Amici argue for—that the language in particular plans must not be construed as providing benefits in excess of statutory minima—might streamline plan terminations for actuaries, but the rule is fundamentally inconsistent with this Court's teaching that benefits in a pension plan are "contractually defined."[3] *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 148 (1985).

2. The Amici's claim that actuaries will not be able to process terminations of pension plans if the decision below is allowed to stand is advocate's hyperbole. If Amici were correct that the decision below has sown widespread confusion, the Internal Revenue Service would have provided guidance, as it did in response to *Blessitt v. Retire-*

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[2] None of the specimen plans refer to the concept of "contingent rights." Nor do they use the phrase "actuarial error," which Amici's attorneys argue is ubiquitous. Moreover, the opinion in *Nobers v. Crucible, Inc.* (App. 161a), nowhere refers to "contingent liabilities," let alone "contingent rights accrued . . . ," and is not, as the Amici assert, ". . . on all four. . . ." with the decision below. (Br. of Amici, p. 14.)

[3] In urging that the lower court correctly decided this case in favor of respondents we have necessarily confined ourselves to the reasoning of that court. That does not mean that there are not other grounds for sustaining its decision. See Mr. Justice Stephens' dissenting opinion (App. 45a-47a.)

ment Plan for Employees of Dixie Engine Co., 817 F.2d 1528 (11th Cir. 1987), *vacated*, 836 F.2d 1571 (1988), even before the Eleventh Circuit agreed to rehear the case en banc. *See* General Counsel Memorandum 39665 (Sept. 25, 1987). The Service has not responded in like fashion to the decision below, again suggesting that, despite the actuaries' doomsday prophecies, the decision below has not engendered widespread uncertainty.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for the writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

Reversion Provision from Model Defined Benefit Plan in Sollee & Shapiro, Pension Plans—Qualification (BNA Tax Management Portfolio, Folio 351), at B-132:

> 14.02 Contributions. The plan assets will never inure to the benefit of the employer and will be held by the trustees solely in the interests of, and for the exclusive purpose of, providing benefits to participants and their beneficiaries and defraying expenses of administering the plan, subject, however, to the following: (a) return of mistake of fact contributions pursuant to section 13.05 above, (b) return of contributions predicated on the Plan's initial qualification, and (c) return of excess plan assets upon plan termination to the extent permitted by ERISA.
>
> 14.03 Prohibited diversion. No distributions from the trust will be made which are prohibited by the provisions of this plan. At no time will it be possible for any part of the Trust's assets to be used for, or revert back to, the employer or to be diverted to purposes other than the exclusive benefit of participants and their beneficiaries, other than mistake-of-fact contributions described in section 13.05, contributions conditioned on the plan's initial qualification as described in section 13.05, and any reversion of excess assets permitted by ERISA upon plan termination.

Reversion Provision from Sample Defined Benefit Plan language in Prentice Hall Pension Plan Forms, at p. 1372-73:

> XXI, C. Nonreversion
>
> 1. Except as provided in this subparagraph 1, the assets of the Plan shall never inure to the benefit of an Employer; such assets shall be held for the exclusive purpose of providing benefits to Members and their Beneficiaries and for defraying the reasonable administrative expenses of the Plan.

* * * *

(e) In the case of the termination of the Plan, any residual assets of the Plan shall be distributed to the Employer at the direction of the Administrator (or at the direction of a trustee appointed upon the application of the Pension Benefit Guaranty Corporation) if all liabilities of the Plan to Members and their Beneficiaries have been satisfied and the distribution does not contravene any provision of law.

Reversion Provision from Model Plan in Canan & Baker, Qualified Retirement Plans (1987 Ed.), at p. 820-821:

12.01 Exclusive Benefit of Participants. Except under the circumstances set forth in Sections [12.10, 12.11 and 12.12] of this Plan, at no time shall any part of the Trust revert to the Employer or be used or diverted to any purpose other than for the exclusive benefit of the Participants or their Beneficiaries or estates. However, notwithstanding the preceding sentence, if, after the termination or partial termination of the Plan by formal action of the Employer or for any other reason, the Accrued Benefit of all Participants and all the Plan liabilities have been paid, then, consistent with Section 4044 of ERISA, any residual assets of the Plan shall revert to the Employer.